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Chapter 1

A Shift in the Legal Climate: The Emergence of Climate Change as a Dominant Legal Issue Across Canada

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Climate change has undoubtedly emerged as *the* environmental issue for the public in much of the developed world, including Canada. It has also become one of this generation's global social and economic challenges. In this article, we provide an update on climate change developments from a legal perspective in four key areas: the state of the international regime; the status of Canadian federal implementation; the development of provincial initiatives, focusing on some key examples; and the emergence of climate change related litigation.

State of the International Regime

The international climate change regime, in the form of the United Nations Framework Convention on Climate Change (UNFCCC),¹ has its roots in the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.² The UNFCCC has provided the context for more substantive negotiations on how to mitigate the effects of human-induced climate change and how to adapt to the impacts that cannot be mitigated. The first product of these negotiations was the Kyoto Protocol, which focused on emission reductions by developed nations effective from 2008 to 2012.³ Negotiations are currently under way for a more comprehensive global mitigation and adaptation effort to come into effect in 2013.

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¹ United Nations Framework Convention on Climate Change, U.N. Doc. A/AC.237/18 (PartII)/Add.1 (1992), 31 I.L.M. 849, on-line at <http://unfccc.int/resource/docs/a/18p2a01.pdf>.

² See generally *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, June 3-14, 1992, U.N. Doc. ACONF.151/26 (Vol. I) (1992), on-line at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/1997/L.7/add.1 (1998), 37 I.L.M. 22, on-line at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

The Kyoto Protocol was signed in 1997 and came into force in 2005. It sets a number of obligations; most notably it requires developed states to reduce their emissions relative to a 1990 baseline by the end of 2012. Targets negotiated on a state-by-state basis range from 8% below to 11% above 1990 levels of emissions. These targets can be met through a combination of domestic action and reliance on three flexibility mechanisms: the Clean Development Mechanism, Joint Implementation, and Emissions Trading.⁴ These mechanisms are available to developed countries to supplement domestic action with reductions achieved outside their own jurisdictions.

Once agreement was reached on the Kyoto rules in 2001, the focus formally shifted to implementation. Many states have made considerable efforts to prepare for the implementation of Kyoto, ranging from the reporting of emissions to the certification of credits generated under the Clean Development Mechanism. A number of developed states have started to bring their emissions down toward their first commitment period targets. Others, such as Canada, Japan, the United States and Australia, however, still struggle to contain the growth of emissions.

Toward a second commitment period

With the entry into force of the Kyoto Protocol in 2005, the attention of negotiators shifted to what would happen to the international regime after the end of the first commitment period of the Kyoto Protocol. Efforts to shape the international regime for the post-2012 period have taken place within the UNFCCC as well as outside. Within the UNFCCC process, the Conferences of the Parties (COP) in Montreal (2005), Nairobi (2006) and Bali (2007) are key. *Climate Change 2007*, the Fourth Assessment Report⁵ of the Intergovernmental Panel on Climate Change (IPCC), will likely have considerable influence over the negotiations of future commitments. A number of processes independent of the UNFCCC have also tackled the climate change issue. They include the G-8,⁶ the Asia-Pacific Partnership on Clean Development and Climate (APP),⁷ the Asia-Pacific Economic Cooperation (APEC)⁸ and efforts by the U.S. to bring together the major emitting countries.⁹

⁴ Kyoto Protocol, arts. 6, 12, 17. In addition, parties can offset emissions through the use of sinks, which are mechanisms to take greenhouse gases (GHGs) back out of the atmosphere. These are discussed below.

⁵ See generally, *Climate Change 2007: Mitigation, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007), on-line at <http://www.ipcc.ch/ipccreports/ar4-wg3.htm>.

⁶ For the G-8 declaration on climate change in Heiligendamm, Germany, see "G8 Summit 2007 Heiligendamm — Summit Documents" (2007), on-line at <http://www.g-8.de/Webs/G8/EN/G8Summit/SummitDocuments/summit-documents.html>.

⁷ For information about the APP, see on-line at <http://www.asiapacificpartnership.org>.

The climate change regime faces a number of key challenges. The Fourth Assessment Report of the IPCC leaves little doubt that the targets negotiated for the first commitment period are inadequate, and that emission reductions in the range of 80-95% for developed states and 50% globally by 2050 relative to 1990 levels are needed to avoid the most serious consequences of climate change. Some developed states, including a number of European Union (EU) states, are clearly leading the way in demonstrating that emission reductions are possible without compromising quality of life. However, two out of the three developed states with the highest per capita emissions are either not parties to the Kyoto Protocol or appear to have abandoned any serious efforts to meet their targets. Issues of responsibility and liability for impacts and adaptation remain unresolved. Discussions on how to engage major developing states, such as China, India, Brazil, South Africa, South Korea and Mexico, in emission reduction efforts have been slow to show results.

At COP 11 in Montreal in 2005, a number of important decisions were made with respect to the future of the climate change regime. Parties agreed to initiate the process of negotiating future commitment period targets for developed states through the establishment of an Ad-hoc Working Group (AWG). It is a process under the Kyoto Protocol, which means the United States only has observer status.¹⁰ In addition, states agreed to initiate a dialogue on the effective implementation of the UNFCCC, most notably its ultimate objective of preventing dangerous human interference with the climate system.

At COP 13 in Bali in 2007, states agreed to initiate formal negotiations of the post-2012 climate change regime. The negotiations will proceed in two parallel negotiating tracks to conclude in 2009. The first track is a continuation of the AWG process under the Kyoto Protocol to set new mitigation targets for developed states that are parties to the Kyoto Protocol. The other will be conducted under the UNFCCC with a focus on commitments from developing states and the U.S. Key cross-cutting issues include technology access by developing countries, adaptation, and financing of developing country efforts.

The agreement in Bali, however, has not resolved the split in the world community on whether the basic structure of Kyoto is sound. The EU and most developing nations continue to favour the basic Kyoto structure. The

⁸ For information on the most recent APEC statement on climate change, see on-line at <http://www.apec2007.org>.

⁹ The initial meeting of the so-called "major emitters" was held in Washington on September 27-28, 2007.

¹⁰ At the same time, the focus of the negotiations in many ways is to find a way to bring the U.S. back under the Kyoto umbrella, especially after Australia deposited its instrument of ratification of the Kyoto Protocol in Bali in December 2007. The U.S. presidential election in 2008 is one of the reasons a final agreement on future targets is considered unlikely until COP 15 in 2009.

U.S., Japan and Canada continue to push for different approaches. The key issue in this debate is whether the United States will re-engage without fundamental changes to the Kyoto structure, a question that may be difficult to answer until after the presidential election in 2008.¹¹

A look ahead

The international climate change regime is undoubtedly at yet another critical stage. On the one hand, developed nations are in the final stages of implementing the first commitment period obligations under the Kyoto Protocol. On the other hand, looking forward, negotiations of the post-2012 regime are also entering a critical stage. There is little doubt now that the first commitment period under the Kyoto Protocol is at best a modest first step toward the ultimate goal of preventing dangerous human interference with the climate system. Consistent with the principle of common but differentiated responsibility in the UNFCCC, developed states have gone first in accepting binding emission reduction obligations under Kyoto. Some have, however, opted out of Kyoto; others will have difficulty meeting their emission reduction targets.

Based on the assumption that the goal of preventing a 2°C increase in global average temperature is a fair quantitative representation of the UNFCCC goal of preventing dangerous human interference with the climate system, there is an emerging consensus in the scientific community, among nations in Europe, and among at least some developing nations that further reductions in the range of 50% globally and 80% for developed states relative to 1990 levels by 2050 are needed, and that developed states need to reduce their emissions by 25-40% by 2020. While emissions in developing countries are low on a per capita basis, significant mitigation efforts are needed in developing countries, particularly as countries invest in energy and transportation infrastructure, and make decisions that affect the future energy efficiency of their societies.

There were, however, some promising signs in Bali. More and more developed countries are taking serious domestic action without waiting for global action. Germany, for example, announced legally binding domestic measures toward a 40% reduction below 1990 levels by 2020. Key developing countries, such as China, South Africa and Brazil, signalled a willingness to take on mitigation commitments. The success of the upcoming negotiations will depend on three components: tough new

¹¹ It is important to keep in mind that the democratic U.S. administration in 1997 was largely responsible for the current Kyoto structure, and that support for cap and trade has grown significantly in both the Senate and the House of Representatives in the U.S.

targets for developed states, assistance from developed to developing countries for mitigation and adaptation, and concrete mitigation commitments from developing countries.

A Federal Update

Although Canada is involved in negotiating the parameters of a post-Kyoto regime, the current federal government has been clear that it will not comply with its commitment under the Protocol to reduce Canada's greenhouse gas (GHG) emissions 6% below 1990 levels between 2008 and 2012.¹² It continues to criticize this initial target as potentially economically disastrous, but has acknowledged the importance of long-term emissions reductions.¹³ As a result, and due in large part to increasing public attention, the past year has seen the first federal framework to control emissions from large industrial facilities since the former Liberal government released drafting instructions in November 2005.¹⁴ Now all of the major federal parties advocate a domestic carbon trading regime for these emitters as the keystone of their emissions reduction policy. Debate has recently focused on targets and mechanics as the federal government prepares for implementation.¹⁵

Federal government initiatives

Political debate on federal emissions regulation reached a new high-water mark in October 2006, shortly after the minority Conservative government introduced Bill C-30, *Canada's Clean Air Act*,¹⁶ and the

¹² See, for example, Environment Canada, *The Cost of Bill C-288 to Canadian Families and Business* (2007), on-line at http://www.ec.gc.ca/doc/media/m_123/report_eng.pdf. Canada recently submitted data to the United Nations that showed its 2004 and 2005 emissions were approximately 32.7% above the country's Kyoto target above 1990 levels: see Environment Canada, *National Inventory Report, 1990-2005: Greenhouse Gas Sources and Sinks in Canada* (2007), on-line at http://www.ec.gc.ca/pdb/ghg/inventory_report/2005_report/tdm-toc_eng.cfm.

¹³ Environment Canada, News Release, April 26, 2007, "Canada's New Government Announces Mandatory Industrial Targets to Tackle Climate Change and Reduce Air Pollution", on-line at <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=4F2292E9-3EFF-48D3-A7E4-CEFA05D70C21>.

¹⁴ Environment Canada, "Drafting Instructions Cross Cutting Provisions: Large Final Emitters Regulations" (November 2005), on-line at http://www.ec.gc.ca/CEPARRegistry/documents/part/LFE_drft_inst/Crosscutting_for_public_comment.pdf. Often referred to as large final emitters, the approximately 700 facilities in the country's heaviest industrial sectors — including electricity generation, upstream oil and gas and energy-intensive industries that use energy derived by fossil fuels for manufacturing — account for approximately half of Canada's GHG emissions.

¹⁵ S. Elgie, "Carbon Offset Trading: A Leaky Sieve or Smart Step?" (2007), 17 J.E.L.P. 235, at p. 240.

¹⁶ Bill C-30, *An Act to amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act (Canada's Clean Air Act)*, 1st sess., 39th Parl. (first reading October 19, 2006; committee report March 30,

accompanying “Notice of Intent to Develop and Implement Regulations and Other Measures to Reduce Air Emission”¹⁷ (the “Notice”). The Notice contained the substance of the Conservative plan. It proposed gradually reducing the intensity of Canadian industrial GHG emissions between 2010 and 2015, permitting only a certain amount of emissions per unit of productivity. It also proposed further intensity-based targets between 2020 and 2025, followed by an absolute cap of between 45% and 65% of 2003 emissions by 2050. Strongly condemned by opposition parties,¹⁸ Bill C-30 was drastically altered by a multi-party legislative committee to incorporate absolute caps for a Kyoto-compliant trading system. The Conservative government, unhappy with these changes, ignored an NDP motion to bring the revised bill to a vote,¹⁹ and on September 14, 2007 Bill C-30 died on the Order Paper.

By this time, however, the federal government had already released its latest plan to regulate industrial emissions of GHGs and other air pollutants. Titled the *Regulatory Framework for Air Emissions*²⁰ (the “Framework”), this new plan commits Canada to reduce its total GHG emissions by 20% below 2006 levels by 2020, still short of the country’s Kyoto target, but a small olive branch to the opposition parties and public that have increasingly called for more aggressive reductions.²¹ The Notice remains the government’s only concrete indication of long-term targets. According to the new Framework, exact industry targets will be formulated in sector-specific regulations, drafts of which are expected to be published in spring 2008.²² Interestingly, the Conservatives decided to set these targets by regulation after it became clear that their legislation, the original Bill C-30, would not be supported in Parliament.

2007), on-line at http://www2.parl.gc.ca/content/hoc/Bills/391/Government/C-30/C-30_2/C-30_2.PDF.

¹⁷ Environment Canada, “Notice of Intent to Develop and Implement Regulations and Other Measures to Reduce Air Emissions”, *Can. Gaz. Part I*, vol. 140, no. 42, p. 3351 (October 21, 2006), on-line at <http://canadagazette.gc.ca/partI/2006/20061021/html/notice-e.html#i3>.

¹⁸ Canada, *House of Commons Debates*, 1st sess., 39th Parl. (December 4, 2006), Edited Hansard No. 090, at p. 1220, on-line at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=hansard&Language=E&Mode=1&Parl=39&Ses=1&DocId=2564121&File=0#Int-1811039>.

¹⁹ Canada, *House of Commons Journals*, 1st sess., 39th Parl. (May 29, 2007), Journal No. 159, on-line at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2974405>. The Conservative government also ignored a similar motion adopted in the House of Commons by the opposition parties which called for the government to respect its Kyoto commitments.

²⁰ Environment Canada, *Regulatory Framework for Air Emissions* (2007), on-line at http://www.ec.gc.ca/doc/media/m_124/report_eng.pdf.

²¹ *Ibid.*, at p. iii.

²² In advance of these drafts, Environment Canada has published technical briefings with respect to proposed targets and a notice that requires certain industrial sectors to report their 2006 GHG emissions in order for Environment Canada to determine how best to regulate them. See Environment Canada, “Clean Air Regulatory Agenda — Regulatory

Retaining a much-criticized aspect of the Notice, but core to the Conservative's approach, the Framework proposes intensity-based rather than absolute emissions reductions. Facilities in regulated sectors — fossil fuel electricity generation, oil and gas, forest products, smelting and refining, iron and steel, iron ore palletizing, potash, cement, lime and chemicals production — whose first year of operation was 2003 or earlier would on average be required to reduce their emissions intensity by 18% of 2006 levels by 2010, and by an additional 2% in every subsequent year until 2020. Newer facilities would not be required to reduce their emissions in their first three years of operations. After that time, they would be required to meet an initial intensity target based on unspecified cleaner fuel standards, following which they would also have to make annual 2% intensity reductions until 2020.

Regulated parties would be able to meet these targets by reducing their actual emissions intensity. Until 2018, they could also achieve a certain percentage of their required reductions by contributing to a technology fund at a rate of \$15 per tonne of excess CO₂ from 2010 to 2012, rising to \$20 per tonne in 2013 and escalating annually thereafter by the growth rate of Canada's nominal gross domestic product. The technology fund would invest primarily in technology and infrastructure projects that are likely to reduce GHG emissions.

Regulated parties could also purchase a variety of emissions credits. The federal government would issue credits to each regulated party whose emissions intensity was below its limits for a given year; these credits could be banked for compliance in future years or sold to other regulated parties through an emissions trading market established by the private sector, potentially managed by the Montreal Climate Exchange. Parties would also be able to purchase domestic offset credits, each representing one tonne of verified CO₂ reduction or removal achieved by a project not otherwise required to do so. The federal government plans to release a policy paper in 2008 describing the scope of such an offset market. Finally, the Framework would allow a small one-time allocation of "early action" credits for regulated parties that reduced emissions between 1992 and 2006.

The Framework remains a "Made in Canada" approach to emissions reduction, offering few linkages to other international emissions trading schemes. At this time, it would allow parties to purchase Certified Emissions Reductions generated by Clean Development Mechanism projects undertaken in the developing world pursuant to the Kyoto Protocol, but only to meet up to 10% of their emissions intensity limits. There might be more integration in the future. The Framework does state that Canada will work

Framework for Industrial Air Emissions: In Depth Technical Briefing" (30 April 2007 - 2 May 2007), on-line at http://www.ec.gc.ca/Content/4/F/2/4F2292E9-3EFF-48D3-A7E4-CEFA05D70C21/techbrief_e.pdf.

with U.S. actors to explore opportunities to link a Canadian regime with any regional, state and federal emissions trading systems in the U.S. that become operational. It also contemplates connecting with other international carbon markets, as they continue to develop, and allowing a greater variety of international credits to be used for domestic compliance. However, the government has suggested it will not endorse such integration if doing so would create binding domestic obligations, favouring instead regional organizations like the Asia-Pacific Partnership, which Canada joined in fall 2007. This partnership is comprised of several countries, including the U.S. and China, that advocate voluntary, legally non-binding GHG reduction targets.²³

A strong opposition

Although the Conservative government has repeatedly asserted that Kyoto targets are not economically achievable, the federal opposition parties, which together form a majority in the House of Commons, have been unanimous in supporting Kyoto compliance. The opposition consensus culminated on June 22, 2007, when Bill C-288, a private member's bill titled the *Kyoto Protocol Implementation Act*²⁴ (the "Implementation Act"), came into force. The Implementation Act requires the federal government to take actions designed to ensure that Canada meets its Kyoto obligations: most notably, the government must prepare and report on the implementation of a "Climate Change Plan" that describes how Canada will meet its Kyoto obligations.²⁵ The Implementation Act then requires the government to ensure these obligations are being fully met, authorizing the government to limit GHG emissions and establish a trading regime to do so.²⁶

Environment Canada released its Climate Change Plan pursuant to the Implementation Act on August 21, 2007.²⁷ Although it highlights Canada's compliance with various requirements under the Kyoto Protocol, such as providing financial assistance to developing countries and submitting national reports to the UNFCCC, the Climate Change Plan essentially restates the government's commitment to the Framework, which will not meet the requirements of Kyoto. The Climate Change Plan reiterates the

²³ See Asia-Pacific Partnership on Clean Development and Climate, on-line at <http://www.asiapacificpartnership.org>.

²⁴ *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 (Bill C-288), in force on Royal Assent June 22, 2007, on-line at http://www2.parl.gc.ca/content/hoc/Bills/391/Private/C-288/C-288_4/C-288_4.PDF.

²⁵ *Kyoto Protocol Implementation Act*, s. 5.

²⁶ *Kyoto Protocol Implementation Act*, s. 7.

²⁷ Environment Canada, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act — 2007*, on-line at http://www.ec.gc.ca/doc/ed-es/p_123/CC_Plan_2007_e.pdf.

government's view that achieving the country's Kyoto targets through domestic reductions would have grave economic consequences and that purchasing international credits would only generate an economic advantage to other countries, while not necessarily promoting real, verifiable and incremental reductions to global emissions.

The National Round Table on the Environment and the Economy (NRTEE) released its response to the government's Climate Change Plan, as required by the Implementation Act, in September 2007.²⁸ The response concluded that although it would result in significant reductions in GHG emissions, the Framework had likely overestimated the amount of these reductions and was unlikely to meet Canada's Kyoto obligations. This response has encouraged critics that argue the government is refusing to abide not only by Canada's Kyoto targets, but also by the Implementation Act — the subject of a court action described below.

Meanwhile, although they united to support the Implementation Act, the opposition parties each developed similar but distinct climate change strategies. Under the leadership of Stephane Dion, the Liberal Party of Canada published its white paper titled *Balancing Our Carbon Budget: A New Approach for Large Industrial Emitters*.²⁹ Like the Conservatives, the Liberals would regulate the GHG emissions of the country's largest industrial emitting sectors. However, the white paper proposes an absolute, rather than an intensity-based, cap. It would also adopt Kyoto targets: beginning January 1, 2008, each sector would be allotted a carbon budget equal to its 1990 emissions minus 6%, representing its share of Canada's Kyoto commitment. Sectoral targets would be lowered in intervals — 1990 levels minus 20% by 2020, minus 35% by 2035 and minus 60-80% by 2050 — similar to the longer term targets currently proposed by the United Kingdom, European Union and the State of California. Each regulated company would then be allocated a portion of its sector's budget, the exact amount of which would depend on whether the company had taken early, voluntary action to reduce its emissions, the number of facilities it operates, and its past and anticipated growth rate relative to other companies in that sector.

The Liberal plan also employs the concept of an investment fund, in this case a Green Investment Account into which a company could deposit a fixed amount if its actual emissions for a given year were greater than its allocation; deposits could later be withdrawn in regulated amounts to fund

²⁸ National Round Table on Environment and Economy, *Response of the National Round Table on the Environment and the Economy to Its Obligations under the Kyoto Protocol Implementation Act* (September 2007), on-line at <http://www.nrtee-trnee.ca/eng/publications/c288-response-2007/NRTEE-C288-Response-2007-eng.pdf>.

²⁹ Liberal Party of Canada, *Balancing Our Carbon Budget: A New Approach for Large Industrial Emitters* (March 2007), on-line at http://www.liberal.ca/pdf/docs/whitepaper_EN.pdf.

qualified projects that would achieve real, verified and incremental emissions reductions. Notably, the Liberals would cap the price of excess emissions in 2008 at C\$20 per tonne of CO₂, generally lower than the 2007 trading price on the European market, but after 2012 they would allow the international market to establish the price. This linkage with international markets is in contrast to the Conservative's plan; as soon as a domestic offset system was established, the Liberals would also allow large industrial emitters to use any Kyoto-certified international emissions credits to achieve up to 25% of their domestic obligations.

Like that of the Liberals, much of the NDP's climate change plan had been incorporated into the revised Bill C-30 before it died. Not surprisingly, then, on October 23, 2007, NDP environment critic Nathan Cullen reintroduced this bill (in the Kyoto-compliant version that came out of Parliamentary committee) as a private member's bill, Bill C-468, *Canada's Clean Air and Climate Change Act*,³⁰ for first reading in the House of Commons. Bill C-468 would establish Kyoto-compliant GHG reduction targets of 6% below 1990 levels between 2008 and 2012 and long-term targets of 20% below 1990 levels by 2020, 35% by 2035 and 60-80% by 2050. The more aggressive end of the long-term targets reflects the emerging international consensus on the emissions reductions required of developed countries to prevent dangerous human interference with the climate system.

Key Provincial Initiatives

While the federal parties debate how to regulate emissions, several provincial governments have adopted aggressive reductions targets and developed their own policies with respect to emissions trading, renewable energy and carbon tax. Some of the more significant of those initiatives are described in this section.

Alberta: Emissions trading

On June 27, 2007, Alberta's *Specified Gas Emitters Regulation*³¹ came into force, setting the first regulatory limits on greenhouse emissions in Canada. The regulation requires every facility that emits more than 100,000 tonnes of CO₂ per year to reduce its GHG emissions intensity by up to 12% between July 1 and December 31, 2007, depending on the age of the facility. Facilities that have operated for less than four years are not required to make immediate reductions to their emissions intensity. Regulated facilities

³⁰ Bill C-468, *An Act to amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act (Canada's Clean Air and Climate Change Act)*, 2nd sess., 39th Parl. (first reading October 23, 2007), on-line at http://www2.parl.gc.ca/content/hoc/Bills/392/Private/C-468/C-468_1/C-468_1.PDF.

³¹ *Specified Gas Emitters Regulation*, Alta. Reg. 139/2007, filed June 27, 2007.

can reduce their emissions intensity by making actual reductions to their emissions; by contributing \$15 to Alberta's Climate Change and Emissions Management Fund for every tonne of CO₂ emitted in excess of their target; or by purchasing offset credits, generated by projects in Alberta that are independently verified as having reduced GHG emissions after 2002 when not otherwise required to do so. Facilities with actual emissions that are below specified targets can earn emissions performance credits, which can then be sold to others.

The federal Conservatives have proposed entering into equivalency agreements with provinces, like Alberta, that choose to establish their own regulatory regime; these agreements would allow the federal government to suspend in the province the application of regulations under the *Canadian Environmental Protection Act, 1999*³² so that only the provincial regime applies, but only if that regime contained environmental protections and public participation rights at least equal to those in a federal regime.³³ How the provinces will react to overlapping federal regulation is unknown. Industry would likely be uncomfortable with a patchwork approach across the country and such discomfort could lead to legal challenges.³⁴

Ontario: Renewable energy

On June 18, 2007, the Ontario government announced its plan to reduce GHG emissions in the province by 6% below 1990 levels by 2014, 15% below 1990 levels by 2020, and 80% below 1990 levels by 2050.³⁵ The short-term targets nearly match Canada's commitment under the Kyoto Protocol and gradually become more aggressive; by 2050, they are among the most aggressive targets announced by any jurisdiction.

To achieve these targets, the Ontario government plans to employ a variety of initiatives, many of which focus on growing its renewable energy capacity. For example, the government plans to retire all of Ontario's coal-fired generation plants by 2014, require a certain percentage of ethanol content in gasoline, ensure that new renewable energy projects account for 10% of Ontario's capacity by 2010 and enter into more standard offer contracts for cogeneration and renewable energy generation. These initiatives will account for approximately half of the targeted reductions for 2014. Power plant emissions, in particular, are expected to drop by 85%

³² *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

³³ Environment Canada, *Regulatory Framework for Air Emissions* (2007), at p. 8, on-line at http://www.ec.gc.ca/doc/media/m_124/report_eng.pdf.

³⁴ Jurisdiction over climate change matters is not specifically enumerated in the constitution and could, like jurisdiction over environmental matters, be litigated, due in large part to the fact that such regulation affects areas of both federal and provincial jurisdiction.

³⁵ Ontario, Ministry of the Environment, *Ontario Greenhouse Gas Emissions Targets: A Technical Brief* (June 18, 2007), on-line at <http://www.gogreenontario.ca/docs/061807-TechnicalBrief.pdf>.

by 2014, when the province will close the last of its coal-fired plants, according to a recently issued regulation under Ontario's *Environmental Protection Act*.³⁶ This expectation assumes the province can source sufficient new generation capacity by 2014, a goal many believe to be unrealistic.

Quebec: Carbon tax

In Quebec, the Liberal minority government has declared climate change a top priority, adopting Canada's Kyoto target for the province. To help achieve this target, Quebec became the first Canadian province to impose a carbon tax on energy producers on October 1, 2007.³⁷ The tax is expected to raise \$200 million in annual tax revenues, which will be deposited into the provincial Green Fund, established in 2006 to help fund reductions in greenhouse gas emissions and improvements to public transportation. The tax will apply to approximately 50 companies that sell hydrocarbon products in bulk to retailers that operate in Quebec and that use a significant amount of hydrocarbons. The tax rate will vary for each fuel, depending on the amount of carbon that it produces during combustion. For example, the rate will be 0.8 cents per litre of gasoline sold in bulk to retailers in Quebec, 0.9 cents for diesel fuel, 0.96 cents for light heating oil, 0.5 cents for propane and \$8.00 per tonne for coal.

Other provincial initiatives

In the west, British Columbia's *Greenhouse Gas Reduction Targets Act*³⁸ came into force on January 1, 2008, setting reduction targets of 33% below 2007 levels by 2020 and 80% below 2007 levels by 2050, requiring each public sector organization to be carbon neutral by the 2010 calendar year, and requiring the provincial government to become carbon neutral by 2008-2009. To help achieve this target, the province plans to require electricity produced in the province to have zero GHG emissions by 2016. It

³⁶ *Cessation of Coal Use — Atikokan, Lambton, Nanticoke and Thunder Bay Generating Stations*, O. Reg. 496/07, filed August 24, 2007, on-line at http://www.e-laws.gov.on.ca/html/source/regs/english/2007/elaws_src_regs_r07496_e.htm.

³⁷ Quebec, Ministry of Natural Resources and Fauna, News Release, June 6, 2007, "Claude B  chard confirme que 200 millions de dollars seront vers  s pour financer la lutte aux changements climatiques", on-line at <http://www.mrnf.gouv.qc.ca/presse/communiqu  s-detail.jsp?id=6217>. The volume or mass of fuel attributable to a regulated company will be determined, in any given year, by the numbers disclosed in its annual declaration submitted under the terms of the *Act respecting the R  gie de l'  nergie*, R.S.Q., c. R-6.01. Note that Quebec has adopted a target of 6% below 1990 levels by 2012 if it receives sufficient federal funding.

³⁸ *Greenhouse Gas Reduction Targets Act*, S.B.C. 2007, c. 42 (Bill 44), Royal Assent November 29, 2007, proclaimed in force January 1, 2008, on-line at http://www.leg.bc.ca/38th3rd/3rd_read/gov44-3.htm.

has also announced plans to introduce legislation in spring 2008 that will phase in the equivalent of California's tailpipe emissions standards by 2016.³⁹ Saskatchewan's Energy and Climate Change Plan, meanwhile, aims to stabilize the province's GHG emissions by 2010 and to reduce emissions 32% from 2004 levels by 2020 and 80% from 2004 levels by 2050.⁴⁰ However, it is unclear whether the province's new Saskatchewan Party government will honour the commitments of this plan, which was released when the NDP was still in power. Manitoba has set its targets to match those of Canada under the Kyoto Protocol; it aims to meet these targets largely by growing its already large renewable energy portfolio and developing ethanol and biodiesel industries.⁴¹

In the Maritimes, Nova Scotia recently passed its *Environmental Goals and Sustainable Prosperity Act*.⁴² The Act makes it a provincial objective to reduce GHG emissions to 10% below 1990 levels by 2020. To achieve these reductions, the province has adopted the long-term goals of implementing emissions standards for new motor vehicles (similar to those adopted by the State of California), increasing the province's renewable energy capacity and improving the energy efficiency of households and industries. New Brunswick recently passed a Climate Change Action Plan that would achieve nearly half of its proposed reductions from energy efficiency and renewable energy measures.⁴³

Generally, the provinces have indicated a willingness to support integration of their climate change strategies with the federal government and U.S. regional initiatives. Ontario, for example, plans to work with the federal government to ensure that early action to reduce GHG emissions taken by Ontario's industrial sectors will be credited in any federal regulation of large final emitters. Ontario and New Brunswick have also expressed interest in partnering with the State of New York and other members of the Regional Greenhouse Gas Initiative (RGGI).⁴⁴ British Columbia and Manitoba have joined the Western Regional Climate Action Initiative and are working closely with California, in particular, with respect

³⁹ British Columbia, Speech from the Throne, 3rd sess., 38th Parl. (February 13, 2007), on-line at http://www.leg.bc.ca/38th3rd/Throne_speech_2007.pdf.

⁴⁰ Saskatchewan, *Saskatchewan Energy and Climate Change Plan 2007*.

⁴¹ Manitoba Energy, Science and Technology, *Green and Growing: Building a Green and Prosperous Future for Manitoba Families* (December 2005), on-line at <http://www.gov.mb.ca/greenandgrowing/green.pdf>.

⁴² *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c. 7 (Bill 146), Royal Assent April 13, 2007, proclaimed in force June 7, 2007, on-line at http://www.gov.ns.ca/legislature/legc/bills/60th_1st/3rd_read/b146.htm.

⁴³ New Brunswick, Department of Environment, Climate Change Secretariat, *Climate Change Action Plan 2007-2012* (2007), on-line at <http://www.gnb.ca/0009/0369/0015/0001-e.pdf>.

⁴⁴ Ontario, Ministry of the Environment, News Release, March 30, 2007, "Ontario to Explore Joining Forces with U.S. States on Climate Change Initiative", on-line at <http://www.ene.gov.on.ca/en/news/2007/033001.php>. See also Regional Greenhouse Gas Initiative, on-line at <http://www.rggi.org/about.htm>.

to vehicle emissions standards.⁴⁵ Manitoba is also a party to the recently signed Midwestern Greenhouse Gas Reduction Accord, along with nine Midwestern U.S. states.⁴⁶ Quebec and the Atlantic provinces, meanwhile, have set emissions reduction targets together with their New England counterparts.⁴⁷ Regional integration is growing as more provinces acknowledge the necessity of a multi-jurisdictional approach to mitigating climate change.

Climate Change Litigation

Climate change has infiltrated North American courts and tribunals as well as its legislatures. Much of the activity in the courtroom has been in the United States; however, there is at least one significant Canadian court case under way. There is also considerable literature on the rise of climate change litigation and its role in addressing climate change in the future.⁴⁸ With the scientific understanding of the links between human-induced increases of greenhouse gas emissions improving with every passing year, and the predicted consequences becoming more and more serious, climate change related litigation is expected to increase significantly. A brief overview of key cases with relevance for Canada is provided as an indication of what the future may hold.

The first Canadian court case to focus on climate change was a recent judicial review application filed with the Federal Court by the Friends of the Earth against the Ministers of Environment and Health for failing to take action against climate change under the *Canadian Environmental Protection Act, 1999* (CEPA).⁴⁹ The application was based on s. 166 of CEPA, which requires the Minister to take certain actions if the release of a substance into the air from Canada may reasonably be anticipated to contribute to air pollution in another country or to air pollution in violation of Canada's international treaty obligations. The applicants based their case on Canada's obligations under the Kyoto Protocol to reduce its greenhouse gas emissions to 6% below 1990 levels. The applicants argued that because

⁴⁵ British Columbia, Office of the Premier, News Release, April 24, 2007, "B.C. Joins Western Regional Climate Change Initiative", on-line at http://www2.news.gov.bc.ca/news_releases_2005-2009/2007OTP0053-000509.htm.

⁴⁶ Midwestern Governors Association, *Midwestern Greenhouse Gas Accord 2007* (November 15, 2007), on-line at <http://www.midwesterngovernors.org/resolutions/GHGAccord.pdf>.

⁴⁷ Conference of New England Governors and Eastern Canadian Premiers, Committee on the Environment and Northeast International Committee on Energy, *Climate Change Action Plan 2001* (August 2001), on-line at http://www.scics.gc.ca/pdf/850084011_e.pdf.

⁴⁸ See, e.g., J.K. Healy and J.M. Tapick, "Climate Change: It's Not Just a Policy Issue for Corporate Counsel — It's a Legal Problem" (2004), 29 Col. J. Envtl. L. 89; D.A. Grossman, "Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation" (2003), 28 Col. J. Envtl. L. 1; B. Mank, "Standing and Global Warming: Is Injury to All Injury to None?" (2005), 35 Envtl. L.J. 1; and T.W. Merrill, "Global Warming as a Public Nuisance" (2005), 30 Col. J. Envtl. L. 293.

⁴⁹ *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

Canada's emissions are roughly 30% above those levels and continue to rise, and because Canada has not taken steps to bring them under control by 2012, it is likely to violate its international treaty obligations and as such is required to act under s. 166(3) of CEPA.⁵⁰ As no action has been taken by the government under this provision, the applicants sought a declaration to that effect and an order of *mandamus* ordering the government to take appropriate steps under CEPA.⁵¹

The application was stayed following the passage of the Implementation Act. It was replaced by substantially similar applications brought before the Federal Court challenging the federal government's failure to comply with the Implementation Act. The focus of the current court proceedings is the failure of the federal government to develop and implement a plan to comply with Canada's emission reduction obligations under the Kyoto Protocol.⁵²

At least one of the climate change cases under way in the U.S. has a Canadian connection. In November 2006, a number of Canadian environmental groups and municipalities filed a petition with the U.S. Environmental Protection Agency (EPA) to reduce emissions from some 150 coal-fired power plants in seven Midwestern U.S. States.⁵³ Among the emissions is a total of 719 megatonnes of greenhouse gas emissions.⁵⁴ The basis for the petition is that ss. 202(a), 302(g) and 302(h) of the U.S. *Clean Air Act* combine to mandate the EPA to require emission reductions when there is evidence of harm to Canadians from emissions in the U.S. The provision in question is similar to s. 166 of CEPA in that it essentially provides reciprocal provisions for each country to take action to address cross-border air pollution.

There have been a number of court challenges in the U.S. dealing with climate change. Some are based on common law tort doctrines such as nuisance. Others involve the consideration of climate change in environmental assessment processes, such as that under the *National Environmental Policy Act*. Another category of litigation has sought to prevent mitigation

⁵⁰ *Friends of the Earth v. Her Majesty the Queen, The Minister of the Environment and The Minister of Health*, Notice of Application filed in the Federal Court, May 28, 2007, Court File No. T-914-07, on-line at <http://www.foecanada.org/images/stories/pdfs/CEPA/notice%20of%20application%20final%20%2007%2005%2028.pdf>.

⁵¹ It will be interesting to see whether this application proceeds now in light of the Implementation Act and the federal government's Climate Change Plan filed on August 21, 2007. Quite possibly, this application could be superseded by a new application challenging the government's compliance with the Implementation Act.

⁵² Please see the following Notices of Application that have been filed in the Federal Court: September 19, 2007, Court File No. T-1683-07; November 19, 2007, Court File No. T-2013-07; and January 17, 2008, Court File No. T-78-08.

⁵³ For further information, see Sierra Legal Defence Fund (now Ecojustice), Media Release, November 1, 2006, "Canadian Cities Join Fight Against Dirty US Coal Power", on-line at <http://www.ecojustice.ca/media-centre/press-releases/canadian-cities-join-fight-against-dirty-us-coal-power>.

⁵⁴ Based on 2002 emissions.

efforts at the state level based on jurisdictional grounds. Finally, there has been litigation in the U.S. dealing with obligations under the *Clean Air Act*.⁵⁵

This final category of climate change litigation in the U.S. involves the only climate change case to date to be heard by the U.S. Supreme Court. In April 2007, in a 5:4 decision, the Supreme Court decided that the EPA has statutory authority to regulate greenhouse gas emissions from motor vehicles. It furthermore determined that the EPA is required to regulate greenhouse gas emissions unless it concludes that such emissions do not contribute to climate change. A determination that emissions from motor vehicles do not contribute to climate change would be reviewable by the court.⁵⁶

A final case to note is a petition filed on behalf of a number of Inuit from Alaska and Canada with the Inter-American Commission on Human Rights (IACHR) in 2005. The initial response from the Commission was that it lacked the information necessary to consider the petition. In 2007, the Commission invited the petitioners to present evidence of the link between climate change and their human rights. The hearing took place on March 1, 2007. It is not clear whether the hearing will result in a reconsideration of the petition or, more likely, an independent consideration by the Commission of the link between climate change and the Inuit's human rights.⁵⁷

Conclusion

Climate change has evolved from an environmental challenge to a major economic, social, political and legal issue. It is emerging as one of the great global challenges of our times. From a legal perspective, it is in transition from a purely international issue to a domestic one as well. Existing legislation, such as the *Canadian Environmental Protection Act, 1999*, is being applied to climate change and new regulation is being proposed by all major political parties in Canada. New initiatives on climate change are emerging and are being implemented on an ongoing basis at all levels of government. At the same time, the adequacy of government and corporate action is being challenged in the courts. In short, climate change has quickly become a focus of Canadian society, an important area of legal practice, and something members of the legal profession would be well served to follow.

⁵⁵ For a good overview of climate change litigation in the U.S., see J.R. Pidot, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues* (Washington: Georgetown University, 2006).

⁵⁶ *Massachusetts v. Environmental Protection Agency*, 549 U.S. No. 05-1120 (2007).

⁵⁷ This petition is the subject of Chapter 3, *infra*.